

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ENHANCED SOFTWARE PRODUCTS,
INC., a Washington
Corporation,

Plaintiff,

v.

OREGON CENTRAL CREDIT UNION,
an Oregon State Chartered
Credit Union,

Defendant.

NO. CV-05-0161-EFS

**ORDER GRANTING DEFENDANT'S
MOTION FOR ENTRY OF PROTECTIVE
ORDER**

On January 10, 2006, Defendant filed a Motion for Entry of Protective Order. (Ct. Rec. 44.) Defendant's motion was opposed in part by Plaintiff in a response filed January 18, 2006. (Ct. Rec. 54.) Attached to their respective pleadings, both parties submitted proposed protective orders. (Ct. Rec. 44 at 6-16 & 54 Ex. A.) A comparison of the parties' proposed protective orders demonstrated disagreement between the language proposed in paragraphs 2, 4(d), 4(e), 5, 8, and 9.

The Court heard oral argument on Defendant's motion during an expedited telephonic hearing held on January 19, 2006. (Ct. Rec. 57.) During that hearing, the parties resolved their disagreements regarding paragraphs 2, 5, and 8. Thus, the only issues remaining for the Court were determinations of what language should be used in paragraphs 4(d),

1 4(e), 5, and 9. After considering the parties' arguments and pursuant
2 to Federal Rule of Civil Procedure 26(c), the Court hereby resolves the
3 parties' disputes concerning paragraphs 4(d), 4(e), 5, and 9 by entering
4 the following protective order. **It is HEREBY ORDERED:**

5 **PROTECTIVE ORDER**

6 1. All documents or information produced or exchanged in the
7 course of this action will be used solely for the purpose of preparing
8 and litigating the action, including any appeals and any other related
9 actions.

10 2. Any documents or information specifically designated as
11 "confidential" or "confidential - attorneys' eyes only" by the party
12 producing or exchanging the documents or information derived therefrom
13 will not be made available or disclosed to any persons other than a
14 "qualified person," as defined in paragraphs 3 and 6, below. Any
15 document or information designated as "confidential - attorneys' eyes
16 only" is subject to the additional restriction that it may not be made
17 available to, disclosed to, summarized to, or discussed with officers or
18 employees of plaintiff, ESP or defendant, OCCU and/or OCCU's successor
19 Oregonians Credit Union ("OCU") notwithstanding the fact that they may
20 be "qualified persons" with respect to documents designated as
21 "confidential." Furthermore, documents or information labeled as
22 "confidential - attorneys' eyes only" provided or disclosed to experts
23 shall not be made available shared, summarized, or discussed with
24 officers or employees of plaintiff, ESP or defendant, OCCU and/or OCCU's
25 successor Oregonians Credit Union ("OCU") notwithstanding the fact that
26 they may be "qualified persons" with respect to documents designated as
27

1 "confidential" by such expert witnesses. Without limiting the scope of
2 the permissible designation, a party may designate as "confidential" or
3 "confidential - attorneys' eyes only" any information and documents that
4 it believes, in good faith, to fall within the scope of Fed.R.Civ.P.
5 26(c)(7) ("a trade secret or other confidential research, development,
6 or commercial information"), whether it be a document, information
7 contained in a document, information revealed during a deposition, or
8 otherwise. The parties do not intend to restrict the use of information
9 designated as "confidential - attorneys' eyes only" in settlement
10 conferences, mediations or arbitrations related to this litigation.

11 3. In depositions, the parties agree to limit the use of
12 "confidential" or "confidential - attorneys' eyes only" documents or
13 their contents to qualified persons as defined below, to prohibit the
14 use, sharing, discussing, or summarizing with the four individuals
15 listed below in paragraph 4, and to prohibit the use, sharing,
16 discussing, or summarizing with any competitor of either party or such
17 competitor's employee unless a written request, identifying the document
18 and the information to be shared, is made and written consent is given
19 prior to the time of the deposition. If written consent is obtained
20 prior to the depositions, then the parties agree to allow the use of
21 such information and documents only in the deposition of the four
22 individuals listed below or the competitors of either party as
23 identified and disclosed in the written consent. No additional use,
24 sharing, disclosing, or summarizing of such information and documents
25 shall occur outside of the deposition. Such information and documents
26 may be so used in the above limited circumstances without losing its
27

1 confidential designation.

2 4. "Qualified person" as used herein means an individual who is:

3 a. An outside lawyer employed by a party in this action and any
4 employee of such lawyer to whom it is necessary that the material be
5 shown for purposes of preparing or litigating this action, including any
6 appeals and related actions;

7 b. A person employed by a party or its lawyers of record in this
8 action specifically as an expert witness or expert consultant
9 (specifically excluding Greg Smith, Amanda Massender, Rick Pisani, and
10 Roy Franklin), to assist in the preparation of the action for trial,
11 such as independent accountants, statisticians, economists, scientists,
12 engineers, health care professionals, or other experts;

13 c. An officer or employee of plaintiff, ESP;

14 d. An officer or employee of defendant, OCCU or OCU; specifically
15 excluding Greg Smith, Amanda Massender, Rick Pasani, or Roy Franklin.

16 e. The Court as provided in paragraph 9.

17 The term "qualified person" also includes any other person who is
18 designated as a qualified person by stipulation of the parties or by
19 order of this court, after notice to all parties. Greg Smith, Amanda
20 Massender, Rick Pisani, and Roy Franklin shall be excluded as
21 "qualified persons" and are prohibited from using, reviewing,
22 discussing, or obtaining any "confidential - attorneys eyes only"
23 documents, unless such documents were generated, viewed or used by those
24 individuals during the period of their employment with ESP. Greg Smith,
25 Amanda Massender, Rick Pisani, and Roy Franklin are specifically
26 prohibited from viewing or having disclosed to them any "confidential -
27 attorneys eyes only" document so designated by ESP that was generated or
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1 created after the termination of their employment with ESP.

2 5. Given that plaintiff's and defendant's technology based
3 businesses involve intellectual property and operate in a highly
4 competitive environment, any document or information designated as
5 "confidential - attorneys' eyes only" shall not be available to,
6 disclosed to, summarized to, or discussed with individuals who own or
7 are employed in any capacity by a competitor of the parties unless other
8 wise permitted by this protective order. This includes, but is not
9 limited to, current employees or owners of "Open Solutions, Inc.,
10 SOSystems, WesCo, CU* Answers, CU* NorthWest, Inc., and including but
11 not limited to Greg Smith, Amanda Massender, Rick Pisani, and Roy
12 Franklin. Furthermore, no documents designated "confidential" or
13 "confidential - attorneys eyes only" may be used during a deposition of
14 any employee or owner of a competitor of plaintiff or defendant without
15 a prior written request and written consent.

16 6. Each party may designate as "confidential" or "confidential -
17 attorneys' eyes only" any documents previously produced or exchanged
18 without having been designated as "confidential" or "confidential -
19 attorneys' eyes only," provided, however, that notice of such
20 designation is received by the respective parties. Such notice must be
21 given in writing to the parties to whom the documents have been
22 previously furnished.

23 7. Information disclosed at the deposition of a party or one of
24 its present or former officers, directors, employees, agents, or
25 independent experts retained by a party for purposes of preparing and
26 litigating the action for trial may be designated by that party as
27 "confidential" or "confidential - attorneys' eyes only" by indicating on
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1 the record at the deposition that the testimony is "confidential" or
2 "confidential - attorneys' eyes only" and subject to the provisions of
3 this protective order. The party may also designate information and
4 documents disclosed at such deposition as "confidential" or
5 "confidential - attorneys eyes only" by notifying all parties in writing
6 of the specific pages and lines of the transcript or, in the case of
7 depositions transcribed and distributed to counsel before the date of
8 this protective order, within 30 days of the entry of this order. Each
9 party must attach a copy of such written statement to the face of the
10 transcript and each copy thereof in his or her possession, custody, or
11 control. All depositions will be treated as confidential for a period
12 of at least 30 days after a full and complete transcript of the
13 deposition is available and at least 30 days after the execution of this
14 protective order. The presence at a deposition of any party, or officer
15 or director thereof as agent for such party, will not be deemed a waiver
16 of confidentiality by any other party, and the lawyer for any party
17 present at a deposition, by its officers or agents or otherwise, will
18 advise his or her client concerning the confidentiality of any
19 information disclosed in the deposition which is so designated.

20 8. Disclosure of "confidential" or "confidential - attorneys eyes
21 only" documents or the sharing of such information and documents with
22 persons who are not "qualified persons" shall not occur unless the party
23 designating the documents or information as "confidential" or
24 "confidential - attorneys' eyes only" consents in writing to such
25 disclosure, or if the court, after notice to all parties, orders such
26 disclosure. Experts who have received "confidential-attorneys eyes only
27 documents" shall be bound by this Order, shall sign Exhibit A attached
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1 hereto, and shall not make available to, share, disclose, summarize, or
2 otherwise discuss the contents or information with officers or employees
3 of plaintiff, ESP or defendant, OCCU and/or OCCU's successor Oregonians
4 Credit Union ("OCU") notwithstanding the fact that they may be
5 "qualified persons" officers or employees of plaintiff, ESP or defendant,
6 OCCU and/or OCCU's successor Oregonians Credit Union ("OCU") not
7 withstanding the fact that they may be "qualified persons."

8 9. A party will not be obligated to challenge the propriety of a
9 confidentiality designation at the time made, and a failure to do so
10 will not preclude a subsequent challenge thereto. In the event that any
11 party to this litigation disagrees at any stage of these proceedings
12 with the designation by the supplying party of any information or
13 document as "confidential" or "confidential - attorneys' eyes only," the
14 parties will try first to resolve such dispute in good faith on an
15 informal basis. If any party contests the confidential nature of any
16 information or document produced or exchanged pursuant to this
17 stipulated protective order and designated "confidential" or
18 "confidential - attorneys' eyes only," such party will give written
19 notice to the lawyers for all parties specifying the specific
20 information with particularity that he or she contends is not
21 confidential. Any party will have no more than 7 days after receipt of
22 such notice to move the court for an order confirming the
23 confidentiality of such information or document, pursuant to the
24 standards of Fed.R.Civ.P. 26(c)(7). Any information or document with
25 respect to which such motion is made will remain confidential under the
26 provisions of this protective order until order of the court. If no
27 party moves within the above 7-day period, the contested information
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1 will no longer be treated as confidential at the expiration of that
2 period.

3 10. The clerk of the court is directed to maintain under seal all
4 documents and transcripts of deposition testimony filed in court in this
5 action that have been designated, in whole or in part, as "confidential"
6 or "confidential - attorneys' eyes only" by a party to the action. All
7 transcripts of depositions will be kept under seal to the extent
8 provided in paragraph 5, above.

9 11. If, a party wishes to file any document, pleading, answer to
10 interrogatory, affidavit, declaration, motion or brief, or other paper
11 containing, appending, summarizing, excerpting, or otherwise embodying
12 confidential information, with the court that has been designated as
13 "confidential" or "confidential - attorneys' eyes only", then that
14 portion of the pleading or other paper in which the confidential
15 information is embodied shall be filed and maintained under seal and
16 shall not be available for public inspection. The party making the
17 filing shall be responsible for filing the confidential information in
18 a sealed envelope marked "CONFIDENTIAL: THIS DOCUMENT IS SUBJECT TO
19 PROTECTIVE ORDER ISSUED BY THIS COURT AND MAY NOT BE EXAMINED OR COPIED
20 EXCEPT IN COMPLIANCE WITH THAT ORDER WHICH PERMITS ACCESS BY ALL COURT
21 PERSONNEL, BY NOT BY THE PUBLIC." Documents designated "confidential"
22 or "confidential - attorneys' eyes only" will be filed in paper form in
23 accordance with Local Rule 3.1 and the Eastern District of Washington's
24 Administrative Procedures for Electronic Filing.

25 12. Designation by a party of information or documents as
26 "confidential" or "confidential - attorneys' eyes only," or failure to
27 so designate, will not be considered nor constitute an admission or
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1 declaration that information or documents are or are not confidential or
2 trade secrets. Neither party will introduce or attempt to introduce
3 into evidence at any trial or proceeding between the parties, the fact
4 that another party designated or failed to designate any information or
5 documents as confidential.

6 13. Each qualified person who has access to confidential documents
7 must be given a copy of this protective order, and will be bound by its
8 terms. Qualified persons must sign the acknowledgment attached as
9 Exhibit A stating that they have read the order and acknowledging that
10 they are bound by its terms.

11 14. In the event that any person (natural or corporate) with no
12 connection to this action or any other related action serves a subpoena,
13 or any other formal or informal method of discovery that calls for the
14 production of material designated as "confidential" or "confidential -
15 attorneys' eyes only" by a party to this action or any other related
16 action, the party to whom the subpoena or any other formal or informal
17 method of discovery is directed shall:

18 a) Within a period of five (5) days of receipt of said
19 discovery request, provide written notice of said request
20 to counsel for the party designating the material at
21 issue as confidential discovery; and

22 b) The party receiving such discovery request will not
23 oppose efforts by the party designating the material to
24 protect and preserve the confidentiality of said
25 material.
26

27 15. This protective order is binding on all parties to this
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1 action and on all parties who have been served with a copy of this
2 order and shall remain in force and effect until modified,
3 superseded, or terminated by written consent of the parties to this
4 litigation or by order of the court made upon notice or application
5 by any party to this litigation or by any other person bound by
6 this provision of this order.

7 16. This order shall in no way constitute a waiver of the
8 rights of the parties to raise or assert any defense or objection
9 heretofore or hereafter raised or asserted, including, but not
10 limited to, defenses or objections with respect to the use,
11 relevance, or admissibility of any documents, testimony, or
12 information subject to this order.

13 17. Nothing in this order shall preclude any party from
14 asserting, if applicable, the attorney-client privilege, a claim of
15 work product protection, or any other applicable privilege or
16 protection as to any discovery material the production of which is
17 sought by any other party.

18 **IT IS HEREBY FURTHER ORDERED:** Defendant's Motion for Entry of
19 Protective Order (**Ct. Rec. 44**) is **GRANTED**.

20 **IT IS SO ORDERED.** The District Court Executive is directed
21 to enter this Order and provide a copy to counsel.

22 **DATED** this 28th day of February, 2006.

23
24 S/ Edward F. Shea
25 EDWARD F. SHEA
26 UNITED STATES DISTRICT JUDGE

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PROTECTIVE ORDER
EXHIBIT A

I, _____, have reviewed the Protective Order entered in *Enhanced Software Products, Inc. v. Oregon Central Credit Union*, (Case No. CV-05-161-EFS) pending in the United States District Court for the Eastern District of Washington before the Honorable Edward F. Shea, and understand the Protective Order. I agree to be bound by the Protective Order.

The materials and information afforded confidential treatment under this Protective Order shall be used by me in connection with the above-referenced litigation and for no other purpose and that I shall have no right to use such materials or information in any other litigation without prior approval of this Court or upon proper order of any court of competent jurisdiction. Further, I agree to keep such information confidential and realize that I may be held in contempt of court for failure to keep such information confidential.

I understand that any use of materials stamped "CONFIDENTIAL" or of information obtained by me from such materials, or from any copy, summary, or abstract thereof, or from any confidential testimony, in any manner may be in violation of the Court's Order. I hereby consent to the exercise of personal jurisdiction in the United States District Court for the Eastern District of Washington for purposes of enforcement of the Order.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this _____ day of _____, 2006.

(Signature)

(Print Name)

(Address)